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In the Supreme Court of the United States

OCTOBER TERM, 1992

JAMES M. ELFELT, ET AL., PETITIONERS

v.

ALBINA COOPER

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether, in order to collect delinquent federal income taxes, the United States may levy upon and sell the taxpayer's interest in joint tenancy homestead property in Wisconsin.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-443

JAMES M. ELFELT, ET AL., PETITIONERS

v.

ALBINA COOPER

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of Sections 6321, 6331, 6334, 6335, 6337, 6338, 6339, 6343, 7402 and 7403 of the Internal Revenue Code (26 U.S.C.) are set forth at Pet. App. 147-163. The pertinent provisions of Section 301.6334-1(c) of the Treasury Regulations on Procedure and Administration (26 C.F.R.) and of Wis. Stat. Ann. § 700.17(2)(a) (West Supp. 1992) are set forth at Pet. 4. Other pertinent provisions are set forth at App., *infra*, 1a-3a.

STATEMENT

1. In 1963, respondent Albina Cooper and her husband, Dale Cooper, purchased a tract of land in Dousman, Wisconsin, as joint tenants. Under Wisconsin law,

"[e]ach of 2 or more joint tenants has an equal interest in the whole property," with a right of survivorship such that, upon the death of the other, "the survivor becomes the sole owner" (Wis. Stat. Ann. § 700.17(2)(a) (West Supp. 1992) (Wis. Stat.).[1] In 1969, the Coopers built a house on that property and thereafter used the house as their residence (Pet. App. 103-104). As their residence, the property constituted their "homestead" under Wisconsin law (Wis. Stat. § 990.01(13)(a) (1981)). As their "homestead," the property could not voluntarily be conveyed or alienated by either spouse without the consent of the other (*id.* § 706.02(1)(f)). "Homestead" property in Wisconsin is also generally entitled to an exemption (in the amount of $40,000) from execution by certain types of creditors (*id.* § 815.20(1) (Supp. 1992)).[2] This limited state-law "homestead" exemption is specifically *not* applicable to debts for "taxes" (*ibid.*).

Dale Cooper failed to pay the federal income taxes that he owed for 1982 (Pet. App. 104). Under Section 6321 of the Internal Revenue Code, a lien for the amount of the unpaid taxes attached to "all property and rights to property, whether real or personal, belonging to" Dale Cooper (26 U.S.C. 6321) and therefore attached to Mr. Cooper's undivided interest in the joint tenancy property (Pet. App. 118, 124-126). Since respondent was not personally liable for her husband's tax obligations, however, the federal lien did not attach to any interest she owned in that property (Pet. App. 104).

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[1] Under Wisconsin law, a married couple may freely choose whether to own property as joint tenants or as tenants in common. See Wis. Stat. § 700.19(2) (1981 & Supp. 1992). A joint tenancy differs from a tenancy in common in that the former includes a right of survivorship and the latter does not. Compare Wis. Stat. § 700.17(2) (Supp. 1992) with *id.* § 700.17(3).

[2] The "homestead" exemption under Wisconsin law applies whether the married couple owns the property as tenants in common or as joint tenants. Wis. Stat. § 815.20(1) (Supp. 1992).

The IRS issued notice of the federal tax lien on Mr. Cooper's property (26 U.S.C. 6323(f)) and, upon Mr. Cooper's failure to pay the delinquent taxes, levied upon and sold his interest in the joint tenancy property pursuant to 26 U.S.C. 6331 and 6335. Mr. Cooper's interest in the property was sold by the IRS to John and Stacey Elfelt at a tax sale conducted on June 25, 1986 (Pet. App. 104).

Following the tax sale, neither respondent nor Mr. Cooper exercised their statutory right to redeem the property by payment of the outstanding taxes and interest (26 U.S.C. 6337(b)).[3] Respondent also failed to pursue the administrative and judicial remedies provided by Sections 6343(b) and 7426(a) of the Internal Revenue Code for asserting any challenges to the levy and sale of the taxpayer's property (Pet. App. 111).[4] After the period for redemption and for challenging the tax levy and sale expired (see note 4, *supra*), the Elfelts received a deed from the United States that, pursuant to Section 6339 of the Code, "operate[d] as a conveyance of all the right, title, and interest [Mr. Cooper] had in and to the real property" (26 U.S.C. 6339(b)(2)). The Elfelts subsequently transferred the interest deeded to them by the

[3] To redeem the property, the taxpayer (or any other person with an interest in the property) may tender the purchase price, along with statutory interest, to the tax sale purchaser within 180 days of the sale. 26 U.S.C. 6337(b). If the purchase price exceeded the costs of the sale and the delinquent tax liability, the IRS will credit or refund the excess "to the person or persons legally entitled thereto" (26 U.S.C. 6342(b)). The ultimate cost of redemption to the taxpayer is thus the sale price of the property (plus interest) or the amount of the taxes owed (plus the costs of the sale and interest), whichever is less.

[4] These statutes authorize the IRS and the federal district courts to set aside an unlawful levy or sale. The statute of limitations for these federal remedies, however, is only nine months (26 U.S.C. 6343(b), 7426(h)), reflecting the need for prompt finality of the title passed by the United States through such sales.

United States to their sons. The Elfelts' sons are the petitioners in this case (Pet. App. 104, 141-142).

2. Petitioners made demand of Albina Cooper under Wis. Stat. § 700.23(3) for an apportioned share of the reasonable rental value of the property for the period of her continued, exclusive occupancy.[5] When respondent refused that demand, petitioners brought suit in Wisconsin state court to partition the property and for rent during the period that respondent adversely maintained exclusive possession of the premises (Pet. App. 105, 140). Approximately one year after the partition action was filed, but before the case was tried, Mr. Cooper died (*id.* at 105-106).[6]

At trial, petitioners asserted that they held valid title to Mr. Cooper's interest in the property through the deed conveyed by the United States at the tax sale. Respondent claimed, however, that petitioners acquired no valid

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[5] Wis. Stat. § 700.23(3)(a) authorizes a cotenant to receive a "proportionate share of the reasonable rental value of the land accruing after written demand for rent if the occupying tenant manifests his intent to occupy the premises to the exclusion of the other cotenant or cotenants."

[6] None of the courts below considered or discussed whether the death of Mr. Cooper *before* the decree in partition was entered mooted the partition case by vesting title to the property in Mrs. Cooper in fee simple by virtue of her right of survivorship. It is possible that the partition decree would be deemed retroactive to the filing date of the partition action, but we have found no Wisconsin decisions addressing this issue. If the partition decree were deemed retroactive, the allocation of the partition sale proceeds *could* compensate Mrs. Cooper for the loss of her right of survivorship, based on the relative life expectancies of the Coopers on the date the suit was filed. See *United States* v. *Rodgers*, 461 U.S. 677, 680, 694 (1983). Whether the partition decree under Wisconsin law would make such an equitable allocation of the sale proceeds (see Wis. Stat. §§ 842.02, 842.14) was not addressed by any of the courts below.

Even if the partition request was mooted by Mr. Cooper's death, petitioners' additional request for an apportioned rent under Wisconsin law for the period between the tax sale and Mr. Cooper's death would not be moot.

interest in the property from the United States because (i) the United States lacked legal authority to levy upon and sell Mr. Cooper's interest in the property and (ii) the IRS failed to follow the procedures mandated by the Internal Revenue Code for conducting such an administrative sale (Pet. App. 105-106).

An advisory jury found that the IRS had complied with the required statutory procedures in conducting the seizure and sale of Mr. Cooper's interest in the property (Pet. App. 106, 140). The trial court then ruled that Mr. Cooper's interest in the property had been validly seized and sold by the United States to petitioners. The court directed respondent to pay an apportioned rent to petitioners for the period of her exclusive occupancy of the premises (see note 5, *supra*) and ordered the property to be partitioned by a sale conducted under Wisconsin law (Pet. App. 106, 143-145).

3. The Wisconsin court of appeals affirmed (Pet. App. 120-139). *Elfelt* v. *Cooper*, 471 N.W.2d 303 (1991). The court stated that the critical issue is whether the Internal Revenue Code authorizes the United States to levy upon and sell a taxpayer's interest in joint tenancy homestead property to satisfy his individual tax liability (Pet. App. 123). The court of appeals noted that this Court has held that the federal tax lien—which attaches to "all property and rights to property" belonging to a delinquent taxpayer (26 U.S.C. 6321)—is extremely broad and is designed "to reach every interest in property that a taxpayer may have" (Pet. App. 124, citing *United States* v. *National Bank of Commerce*, 472 U.S. 713, 719-720 (1985)). The court concluded that a joint tenant, who owns "an equal interest in the whole property for the duration of the tenancy" (Pet. App. 126, citing Wis. Stat. § 700.17(2)(a) (Supp. 1992)), necessarily has a "property" interest in "the whole property" under Wisconsin law. "Joint tenants have the right to sell their shares or seek and obtain partition" (Pet. App. 126, cit-

ing Wis. Stat. § 842.02; *Nichols* v. *Nichols*, 168 N.W.2d 876, 878 (Wis. 1969)). Since the joint tenancy interest is a "property" interest, it is subject to the federal tax lien (Pet. App. 127).

The court then considered what effect, if any, should be given to the fact that the Coopers' property was used as their residence and thus constituted their "homestead" under Wisconsin law (Pet. App. 127). The court noted that there are two consequences of the "homestead" designation of property in Wisconsin: (i) a voluntary conveyance or alienation "of a property interest existing as a homestead * * * must contain both spouses' signatures" (*ibid.*, citing Wis. Stat. § 706.02(1)(f)); and (ii) an interest in "homestead" property is generally entitled to a limited exemption (in the amount of $40,000, see Wis. Stat. § 815.20(1) (Supp. 1992)) from execution by certain types of creditors (Pet. App. 127). The court held (*ibid.*) that the State's formal "signature requirement" for consensual conveyances of "homestead" property "is inoperative * * * [to] prevent" the nonconsensual levy and sale of that property pursuant to 26 U.S.C. 6331, 6335. "Furthermore, it has been held that state homestead exemptions do not prevent the IRS from levying" on a delinquent taxpayer's interest in such property (Pet. App. 127, citing *United States* v. *Hoffman*, 643 F. Supp. 346, 349 (E.D. Wis. 1986)).

Because Mr. Cooper had an interest in the property to which the federal lien attached, the court of appeals concluded that the Internal Revenue Code (and not state law) determines the procedures that the United States may pursue to collect the acknowledged tax debt of Mr. Cooper. The court noted that the administrative levy and sale of the taxpayer's interest in property were explicitly authorized by Section 6331 of the Code (Pet. App. 128-130).[7] Because the United States validly seized and sold

[7] The court of appeals rejected respondent's further contention that the levy and sale of Mr. Cooper's interest in the property were

Mr. Cooper's interest in the property, petitioners were entitled, under Wisconsin law, to partition the property and to obtain an apportioned, interim rent for the period of respondent's exclusive possession of the premises (Pet. App. 133).

4. The Supreme Court of Wisconsin reversed (Pet. App. 101-119). *Elfelt* v. *Cooper*, 485 N.W.2d 56 (1992). The court held that, absent respondent's consent to the sale, the United States lacks authority to seize and sell Mr. Cooper's interest in the joint tenancy homestead property to collect his delinquent tax obligation.[8]

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unconstitutional because Section 6331 does not require that a spouse be given notice of the sale of her husband's interest. The court observed that the only interest subject to the levy and sale was the *taxpayer's* interest; the sale did not purport to transfer or otherwise affect respondent's separate interest in the property. Because respondent had "the same interest after the sale that she did before the sale" (Pet. App. 131), the court concluded there was no requirement that she be given notice of the sale. See also note 6, *supra*.

The court of appeals also rejected respondent's claim that the homestead interest was an "indivisible" interest under state law and that only the *entire* property may be sold for the sale to be effective. The court noted that a homestead property *is* divisible under Wisconsin law, for the joint tenants' interest may be partitioned (Pet. App. 126), may be judicially foreclosed (*id.* at 131), and may be conveyed voluntarily with the consent of both spouses (*id.* at 132).

[8] Having concluded that the IRS lacked authority to seize and sell Mr. Cooper's interest in the homestead property, the court stated that it would not consider, and did not reach, respondent's argument that "the property was indivisible and that therefore the IRS should have sold the entire homestead, not just Mr. Cooper's interest" under 26 U.S.C. 6335(c) (Pet. App. 111 n.3). For the same reason, the court declined to consider respondent's contention that the levy and sale of her husband's interest in the property violated due process by failing to give her notice of the sale (*ibid.*). The court did state, however, that, if the effect of the levy and sale was to eliminate respondent's right of survivorship by converting the joint tenancy into a tenacy in common, "serious constitutional doubt" would arise as to whether notice to respondent of the sale was required (*ibid.*). But see note 6, *supra*.

The court emphasized that, under Wisconsin law, no interest in homestead property held by spouses in joint tenancy could be voluntarily conveyed or alienated by one spouse without the consent of the other: "[I]t is absolutely inalienable without the consent of both spouses and is therefore worthless to one spouse acting alone without the consent of the other" (Pet. App. 116; see *id.* at 115 n.4, quoting Wis. Stat. § 706.02(1)(f)).[9] While the court recognized that a joint tenant's interest in homestead property could be the subject of *non*consensual judicial execution procedures to seize and sell the property, the court emphasized that the IRS had not proceeded judicially in this case (Pet. App. 118):

> As Mr. Cooper would not be able to convey any interest of the jointly held spousal homestead without Mrs. Cooper's consent, the IRS, which merely steps into Mr. Cooper's shoes, also cannot convey any interest of the jointly held spousal homestead without either Mrs. Cooper's consent or court action. Due to the nature of Mr. Cooper's property interest under Wisconsin law, any conveyance of that interest by the IRS without Mrs. Cooper's consent and without court action is ineffective. Consequently, the Elfelts did not obtain and do not now own an interest in Mrs. Cooper's homestead.

The court did not doubt that "if the IRS had * * * brought a lien foreclosure action in district court, the IRS might validly have conveyed an interest in the Coopers' jointly held spousal homestead" (Pet. App. 118). According to the court, the fatal problem for petitioners was that the State's conveyancing statutes required the wife's consent to any nonjudicial conveyance of the hus-

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[9] The court stated that the joint tenancy interest in homestead property was "indivisible by one spouse without the consent of the other" because, under the State's conveyancing statute (Wis. Stat. § 706.02(1)(f)), "it is absolutely inalienable without the consent of both spouses" (Pet. App. 115-116).

band's interest in the property: Since the wife did not consent, the court concluded that the conveyance of the property by the United States was ineffective (*ibid.*). Concluding that the United States did not validly convey any interest in the property, the court held that respondent became the sole owner of the property upon Mr. Cooper's death "under her right of survivorship" (Pet. App. 119).

DISCUSSION

The Supreme Court of Wisconsin has acknowledged that the property interest that a joint tenant owns in his residence in Wisconsin is subject to the federal lien created by Section 6321 of the Internal Revenue Code for the collection of delinquent taxes. The court held, however, that that property interest may not be administratively sold and conveyed by the United States, under Section 6331 of the Code, without the consent of the joint tenant's spouse.

We do not agree with the court's reasoning or its conclusion. But the decision in this case purports to be based on the particular features of the State's conveyancing laws and does not directly conflict with any decision of this Court. Moreover, the court conceded that, even without the consent of the spouse, the United States may judicially foreclose such joint tenancy interests in homestead property under 26 U.S.C. 7403. Since, even in Wisconsin, the United States may thus recover delinquent taxes by that alternative method, the question presented in this case is not clearly of sufficient, recurring importance to warrant further review.

1. a. If any person liable for federal taxes neglects or refuses to pay them after assessment, notice and demand, the amount of the unpaid taxes "shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." 26 U.S.C. 6321. The lien reaches both tangible and in-

tangible property and extends to property that is both currently existing and later acquired. See 26 C.F.R. 301.6321-1. The lien arises at the time the assessment is made and continues until the liability is satisfied or becomes unenforceable by reason of lapse of time. 26 U.S.C. 6322. It is evident from the language of these statutes that the tax lien is broadly designed to reach every interest in property owned by the delinquent taxpayer. "Stronger language could hardly have been selected to reveal a purpose to assure the collection of taxes." *Glass City Bank* v. *United States*, 326 U.S. 265, 267 (1945).

Attachment of the federal tax lien depends on whether "property" or "rights to property" exist under state law, and the fundamental definition of the underlying property interest is left to state law. *Aquilino* v. *United States*, 363 U.S. 509, 512-515 (1960); *United States* v. *Bess*, 357 U.S. 51, 55-56 (1958). Once it is determined that state law has created a "property" interest, however, state law is inoperative to prevent the consequences of the attachment of the federal lien. See *United States* v. *Rodgers*, 461 U.S. at 700-702 (state-created exemption against forced sale of homestead is not effective to prevent action to foreclose the federal tax lien under 26 U.S.C. 7403); *United States* v. *Bess*, 357 U.S. at 56-57 (state law shielding insured's interest in cash surrender value of insurance policy from private creditors did not shield interest from operation of federal tax lien). See also *United States* v. *Mitchell*, 403 U.S. 190, 205 (1971); *United States* v. *Union Central Life Ins. Co.*, 368 U.S. 291, 293-295 (1961). The consequences of the attachment of a federal tax lien to particular property are matters solely of federal law.

Once a valid lien for delinquent taxes has arisen, Congress has conferred broad powers on the Secretary of the Treasury to take affirmative action to enforce collection against property of the taxpayer. The Internal

Revenue Code creates several distinct collection alternatives. The government may sue to reduce its assessment to judgment and, on obtaining a judgment, exercise the rights of a judgment creditor. 26 U.S.C. 6502(a), 7401, 7402. The government may institute a foreclosure action in federal district court to enforce its lien against property in which the taxpayer has an interest. 26 U.S.C. 7403. A foreclosure is not limited to the sale of the taxpayer's own interest in the property; instead, the entire property in which the United States has a claim by virtue of its federal tax lien may be sold in foreclosure. See *United States* v. *Rodgers*, 461 U.S. at 680. The interests of third parties in the property sold at foreclosure are compensated out of the proceeds of the sale. *Id.* at 680, 694. The government may thus force a sale of property interests *other* than those of the delinquent taxpayer in order to realize the highest return possible on the property that is subject to the federal tax lien. *Id.* at 699. The result of judicial foreclosure is that all rights and claims of all parties to the property are resolved and clear title to the property passes to the purchaser.

Alternatively, as occurred in this case, the government may find it appropriate to proceed administratively, without judicial intervention, to levy upon and sell a delinquent taxpayer's interest in a property. 26 U.S.C. 6331, 6335. See *United States* v. *National Bank of Commerce*, 472 U.S. at 720-721. Section 6331(a) provides that, if any person liable for tax neglects to pay the same after notice and demand, "it shall be lawful for the Secretary to collect such tax * * * by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax." Section 6334(a) sets forth the specific property interests that are exempt from levy as a matter of federal law. Section 6334(c) emphasizes that "[n]otwithstanding any other law of the United States * * *

no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a)." See *United States* v. *Mitchell*, 403 U.S. at 205. Because homestead property is not exempt from the federal levy,[10] Treasury regulations thus provide that "property exempt from execution under State personal or homestead exemption laws is, nevertheless, subject to levy by the United States for collection of its taxes." 26 C.F.R. 301.6334-1(c).

In any case where the IRS is authorized to proceed by levy, it may seize and sell the property in accordance with the procedures set forth in Section 6335. 26 U.S.C. 6331(b). The administrative levy has been described as a provisional remedy. In contrast to the lien foreclosure suit, a levy affects only the taxpayer's interest in a property. *United States* v. *National Bank of Commerce*, 472 U.S. at 727. The underlying rationale of the administrative levy is "the need of the government promptly to secure its revenues." *Id.* at 721 (quoting *Phillips* v. *Commisioner*, 283 U.S. 589, 596 (1931)). As this Court has observed, the levy power is essential to our self-assessment system of taxation, for it provides a quick and

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[10] When the taxpayer's interest in the property involved in this case was levied upon and sold, Section 6334 contained no exemption from levy for homestead interests. In 1988, the Code was amended to create a limited exemption from levy for the "principal residence" of the taxpayer for levies issued on or after July 1, 1989. See Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 6236(c)(4)(A), 102 Stat. 3738-3739 (26 U.S.C. 6334(a)(13)). That exemption is inapplicable, however, if "a district director or assistant district director of the Internal Revenue Service personally approves (in writing) the levy." Pub. L. No. 100-647, § 6236(c)(4)(B), 102 Stat. 3739 (26 U.S.C. 6334(e)(1)). Consequently, homesteads remain subject to the administrative collection process. Contrary to respondent's suggestion (Br. in Opp. 6-8), the limited exemption provided by Section 6334(a)(13) will not prevent the issue presented by this case from recurring in the future because the statute continues to afford the IRS discretion to proceed against a homestead by administrative means.

relatively inexpensive method of tax collection that enhances voluntary taxpayer compliance. 472 U.S. at 721.

The administrative levy does not finally determine or establish rights of competing claimants in the property subject to seizure. Those rights must be resolved in subsequent judicial proceedings that are ordinarily conducted in state courts. See 472 U.S. at 731. The administrative sale does not purport to convey clear title to property; instead, it conveys "all the right, title, and interest the [delinquent taxpayer] had in and to the real property" (26 U.S.C. 6339(b)(2)). The value that can be realized by the government from the levy is, as a consequence, often less than would be realized in a foreclosure action. But the levy and sale procedure results in a prompt receipt of delinquent tax funds and makes it unnecessary for the United States to participate in the sometimes protracted and expensive process of judicial foreclosure.

Third parties who possess interests or claims to levied property may, as in the present case, obtain a determination of their rights to the property in a quiet title action. In addition, Section 7426 of the Code authorizes anyone claiming an interest in such property to bring a civil action against the United States to have the property or the proceeds of its sale returned, while Section 6343(b) of the Code provides an administrative method for the return of property that has been wrongfully levied.

b. In this case, acting pursuant to Sections 6331 and 6335 of the Code, the IRS levied upon and sold the interest that the delinquent taxpayer possessed in property located in Dousman, Wisconsin. The property at issue had been owned by taxpayer and respondent in joint tenancy and used as their residence. Accordingly, it was their "homestead" within the meaning of Wisconsin law, which defines the "homestead" as "the dwelling, and so much of the land surrounding it as is reasonably necessary for use of the dwelling as a home, but not less than one-

fourth acre * * * and not exceeding 40 acres." Wis. Stat. §§ 706.01(7), 990.01(13)(a). As a "homestead," the property's voluntary alienation was restricted, and its availability to creditors was limited. But, as the Wisconsin courts have held, the laws restricting the alienation of homestead interests and exempting the homestead from execution are not intended to create new property rights or to alter the nature of the property interest held by either spouse.[11] See *Radtke* v. *Radtke*, 19 N.W.2d 169, 170 (Wis. 1945); *Schapiro* v. *Security Savings & Loan Ass'n*, 441 N.W.2d 241, 244 (Wis. Ct. App. 1989). Because respondent and taxpayer held the property in joint tenancy, each possessed "an equal interest in the whole property for the duration of the tenancy," and, "[o]n the death of one * * *, the survivor becomes the sole owner" (Wis. Stat. § 700.17(2)(a) (Supp. 1992)). Each joint tenant's interest in the property may be encumbered by private security interests as well as statutory liens, including liens for unpaid income taxes. Upon the death of a joint tenant whose interest is so encumbered, the survivor takes the decedent's interest subject to those liens. *Id.* § 700.24 (Supp. 1992).[12] A joint tenant may alienate his interest in the property and unilaterally sever the tenancy. See, *e.g.*, *Nelson* v. *Albrechtson*, 287 N.W.2d 811, 817 (Wis. 1980); *Nichols* v. *Nichols*, 168 N.W.2d 876, 878 (Wis. 1969).

The homestead of a married couple, however, whether held in joint tenancy, in a tenancy in common, or solely by one spouse, is protected for the duration of the mar-

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[11] Because homestead rights are not estates, a spouse has the power to abandon the property as a homestead and thereby defeat the other spouse's right to veto a sale of the homestead. See *Radtke* v. *Radtke*, 19 N.W.2d 169, 170 (Wis. 1945).

[12] The statutory liens identified in Section 700.24 include liens for unpaid income and franchise taxes, gift taxes, public assistance payments, and construction and mechanics liens.

riage against the voluntary transfer or conveyance of any interest in the property by one spouse, unless the consent of the other spouse is obtained. Wis. Stat. § 706.02(1)(f). A voluntary conveyance that does not have the signature of both spouses is thus invalid. See, *e.g.*, *In re Howe*, 20 B.R. 938, 942-943 (Bankr. W.D. Wis. 1982); *State Bank of Drummond* v. *Christophersen*, 286 NW.2d 547, 551 (Wis. 1980); *Schapiro* v. *Security Savings & Loan Ass'n*, 441 N.W.2d at 244.

This restriction on transfer of the homestead, however, applies only to *voluntary* conveyances. It has no application to transactions whereby an interest in land is affected "[b]y act or operation of law." Wis. Stat. § 706.01(2)(a)(1981). See also *id.* §§ 706.01(1), 706.02(1)(1981). Thus, Section 706.02(1)(f) does not protect the homestead from the operation and effect of statutorily arising liens. See *id.* § 700.24 (Supp. 1992). Moreover, Section 706.02(1)(f) does not establish the extent to which the homestead is protected from the reach of either private or governmental creditors. These protections are separately set forth in Section 815.20(1), which exempts the homestead from execution, from judgment liens, and from liability for the debts of the owner to the extent of $40,000. See *In re Clark*, 116 B.R. 672 (Bankr. W.D. Wis. 1989).[13] The limitations of Section 815.20(1), however, expressly do not apply to "tax" debts or to other liens arising by operation of law.[14] See Wis. Stat.

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[13] See also Wis. Stat. § 990.01(14) (Supp. 1992) (defining "exempt homestead" as "the dwelling * * * and so much of the land surrounding it as is reasonably necessary for its use as a home * * * within the limitation as to value * * * under s. 815.20").

[14] Wisconsin's income tax collection statutes now protect "marital property" from collection of tax debts that are solely the responsibility of one spouse. Collection in those circumstances is limited to nonmarital property or to setoffs. See Wis. Stat. §§ 71.91(3), 71.10(6)(a) and (b) (1981), 766.55(2)(d) (Supp. 1992). The definition of marital property is set forth in the enactments governing marital

§ 815.20(1) (Supp. 1992); *In re Hazard*, 113 B.R. 494, 497 (W.D. Wis. 1990).

Thus, although Wisconsin law places restrictions on the voluntary alienation of a homestead, the homestead is not beyond the reach of liens or of execution upon those liens. Moreover, the restrictions on execution that exist under Wisconsin law are not applicable to liens arising by operation of law, including tax liens. Wis. Stat. § 815.20(1) (Supp. 1992). See *In re Bradshaw*, 125 B.R. 782, 784 (Bankr. E.D. Wis. 1991); *In re Howe*, 20 B.R. 938, 942 (Bankr. W.D. Wis. 1982).

2. Against this background, the Supreme Court of Wisconsin recognized that the tax lien of the United States properly attached to the taxpayer's interest in the joint tenancy homestead property, but the court held that the United States could not voluntarily transfer that interest—except though judicial foreclosure proceedings—without the consent of the taxpayer's spouse. The court reasoned that the United States "merely steps into [the] shoes" of the taxpayer and, since the taxpayer "cannot convey any interest of the jointly held spousal homestead without either Mrs. Cooper's consent or court action," neither could the United States (Pet. App. 118).

The court's analysis misapprehends the respective roles of state and federal law in the collection of federal taxes and overlooks the specific provisons of Sections 6331 through 6339 of the Internal Revenue Code.

a. The Supreme Court of Wisconsin correctly acknowledged that a joint tenant's interest in a homestead in Wisconsin is a "property" interest to which the federal tax lien may attach. Section 6331 of the Internal Revenue

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property rights, which became effective on January 1, 1986. The enactment of these laws was not intended to affect the classification of property acquired prior to that date. *Id.* § 766.31(8) (Supp. 1992). Apart from previously acquired property and property otherwise defined, all property of spouses is now presumed to be marital property. *Id.* § 766.31(1) (Supp. 1992).

Code expressly authorizes the United States to seize such interests in "property" from a delinquent taxpayer "by levy." And, since such property is *not* exempt from levy under Section 6334 of the Code (see page 12 & note 10, *supra*), Section 6335 of the Code authorizes the IRS to sell the taxpayer's interest in the property. Section 6342 of the Code then directs that the sale proceeds, less the costs of the sale, be applied toward satisfaction of the delinquent tax liability. After the sale occurs, in the absence of redemption of the property, the United States is to issue a deed to the purchaser that, by direction of federal law, "shall be considered and operate as a conveyance of all the right, title, and interest the [delinquent taxpayer] had in and to the real property" (26 U.S.C. 6339(b)(2)).

The consensual conveyancing requirements for such property under Wisconsin law are preempted by this federal statutory scheme. As this Court stated in *United States* v. *National Bank of Commerce*, 472 U.S. at 722:

> [T]he federal statute "creates no property rights but merely attaches consequences, federally defined, to rights created under state law." *United States* v. *Bess*, 357 U.S. 51, 55 (1958). And those consequences are "a matter left to federal law." *United States* v. *Rodgers*, 461 U.S., at 683. "[O]nce it has been determined that state law creates sufficient interests in the [taxpayer] to satisfy the requirements of [the statute], state law is inoperative," and the tax consequences thenceforth are dictated by federal law.

In *United States* v. *Rodgers*, the Court similarly emphasized that "it has long been an axiom of our tax collection scheme that, although the definition of underlying property interests is left to state law, the consequences that attach to those interests is a matter left to federal law." 461 U.S. at 683.

The manner by which the United States conveys an interest in property seized from a delinquent taxpayer is thus a matter of federal law. State conveyancing rules cannot dictate requirements contrary to the express provisions of Section 6339, which authorizes the United States, after levy and sale, to issue a "deed [that] *shall be considered and operate as a conveyance* of all the right, title, and interest" the delinquent taxpayer possessed in the property (26 U.S.C. 6339(b)(2) (emphasis added)). The fact that the State would—in the absence of the consent of the spouse—require judicial foreclosure to convey such an interest does not preclude Congress from authorizing the United States to elect the simpler, quicker, and less expensive route of administrative levy and sale.

b. In *Herndon* v. *United States*, 501 F.2d 1219 (1974), the Eighth Circuit held that the United States could administratively levy and sell the delinquent taxpayer's interest in homestead property notwithstanding the homestead rights of the taxpayer's spouse under Arkansas law. The court emphasized that (*id.* at 1223):

> The Government here is only claiming the right to sell [the delinquent taxpayer's] "right, title, and interest in the instant property, leaving any purported interest held by [the taxpayer's spouse] unimpaired."

While the buyer at the tax sale may take the taxpayer's interest "subject to [the spouse's] homestead rights," that does not alter the provisions of federal law that authorize the United States to levy and sell, and then convey, the interest that the delinquent taxpayer owns in the property. *Id.* at 1223.

The *Herndon* decision arose under Arkansas law and thus did not consider Wisconsin's conveyancing statute, which was relied upon by the Supreme Court of Wisconsin in this case. The *Herndon* decision thus cannot be

said to conflict directly with the decision below. But the analysis applied in *Herndon*, and by this Court in *National Bank of Commerce* and *Rodgers*, is squarely at odds with the reasoning adopted by the court in this case.

c. The decision in this case acknowledges the right of the United States, under Section 7403 of the Internal Revenue Code, judicially to foreclose its lien on joint tenancy homestead property (Pet. App. 118). Prior to the decision below, a federal district court in Wisconsin also had held that the United States could foreclose its tax lien against Wisconsin homestead property, even though only one spouse was liable for the tax. *United States* v. *Hoffman*, 643 F. Supp. 346 (E.D. Wis. 1986). And, in *In re Blodgett*, 115 F. Supp. 33 (E.D. Wis. 1953), the court further concluded that the nonliable spouse "could be compelled to accept a money satisfaction for her interest in [the property]" (*id.* at 35). See also note 6, *supra*.

Since the United States will be able, even in Wisconsin, to assert its lien against, and foreclose upon, joint tenancy homestead property when necessary for the collection of taxes, the decision in this case is not expected to create a significant, recurring obstacle to the enforcement of federal tax obligations. If, in the future, the decision in this case is adopted and applied in other jurisdictions, further review by this Court may then be warranted.

CONCLUSION

The decision below is not correct, but the question presented is not clearly of such substantial, recurring importance as to warrant further review at this time.

Respectfully submitted.

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STATUTORY APPENDIX

1. Wis. Stat. Ann. § 700.23(3) (West 1981) provides, in relevant part:

> If land belonging to such cotenants is occupied by one cotenant and not by another, any cotenant not occupying the premises may recover from the occupying cotenant:
>
> (a) A proportionate share of the reasonable rental value of the land accruing after written demand for rent if the occupying tenant manifests his intent to occupy the premises to the exclusion of the other cotenant or cotenants;
>
> * * * * *

2. Wis. Stat. Ann. § 706.01 (West 1981) provides, in relevant part:

> (1) Subject to the exclusions in sub. (2), this chapter shall govern every transaction by which any interest in land is created, aliened, mortgaged, assigned or may be otherwise affected in law or in equity.
>
> (2) Excluded from the operation of this chapter are transactions which an interest in land is affected:
>
> (a) By act or operation of law;
>
> * * * * *

3. Wis. Stat. Ann. § 706.02(1) (West 1981) provides, in relevant part:

> Transactions under s. 706.01(1) shall not be valid unless evidenced by a conveyance which:
>
> (a) Identifies the parties; and
>
> (b) Identifies the land; and
>
> (c) Identifies the interest conveyed * * *; and

(d) Is signed by or on behalf of each of the grantors; and

(e) Is signed by or on behalf of all parties, if a lease or contract to convey; and

(f) Is signed, or joined in by separate conveyance, by or on behalf of each spouse, if the conveyance alienates any interest of a married person in a homestead * * * except conveyances between spouses, but on a purchase money mortgage pledging that property as security only the purchaser need sign the mortgage; and

(g) Is delivered. * * *

4. Wis. Stat. Ann. § 815.20(1) (West Supp. 1992) provides:

> An exempt homestead as defined in s. 990.01(14) selected by a resident owner and occupied by him or her shall be exempt from execution, from the lien of every judgment and from liability for the debts of the owner to the amount of $40,000, except mortgages, laborers', mechanics' and purchase money liens and taxes and except as otherwise provided. * * * The exemption extends to land owned by husband and wife jointly or in common or as marital property, and when they reside in the same household may be claimed by either or may be divided in any proportion between them, but the exemption may not exceed $40,000 for the household. If the husband and wife fail to agree on the division of exemption, the exemption shall be divided between them by the court in which the first judgment was taken. * * *

5. Wis. Stat. Ann. § 990.01(13)(a) (West 1981) provides:

> The word "homestead" means the dwelling and so much of the land surrounding it as is reasonably necessary for use of the dwelling as a home, but not less than one-fourth acre (if available) and not exceeding 40 acres.

6. Wis. Stat. Ann. § 990.01(14) (West 1981) provides:

> The words "exempt homestead" mean that part of the homestead within the limitation as to value set forth in s. 815.20 * * *.

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